Supreme Court, U.S.
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No. 93-____

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1993

Arthur Calderon, Warden, ***Petitioner***

v.

Andre Johnson, ***Respondent***

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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68 pp

QUESTION PRESENTED

Whether, despite the presumption of correctness accorded state court findings of facts in 28 U.S.C. § 2254 habeas corpus cases, a majority of a Ninth Circuit could ever find a state court prosecutor's facially race-neutral reasons for exercising a peremptory challenge are insufficient to overcome a *Batson* challenge when the prosecutor's race-neutral reasons have been credited as honest and bonafide by the state court trial judge and the state court of appeal.

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OPINION BELOW

The published opinion of the Court of Appeals for the Ninth Circuit is reported as *Johnson v. Vasquez*, 3 F.3d 1327 (1993).[1/] A copy of the opinion is reproduced in Appendix A of this Petition.

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1. Daniel B. Vasquez, the former Warden of the California State Prison, San Quentin, was replaced by Arthur Calderon, the current Warden. Thus, Arthur Calderon is the Petitioner in this Petition.

JURISDICTION

The opinion below was filed on September 2, 1993. The Ninth Circuit denied California's petition for rehearing and suggestion for rehearing *en banc* on February 22, 1994. The Ninth Circuit has stayed issuance of the mandate until April 10, 1994. However, the stay will continue in effect until final disposition by this Court if this Petition is filed before April 10, 1994.

Respondent Johnson first invoked federal court jurisdiction in his *habeas corpus* case under 28 U.S.C. § 2254. Petitioner Calderon [the State of California] now invokes jurisdiction of this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "No state shall . . . deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

In 1986 the State of California charged respondent Andre Johnson with two counts of robbery with the use of a handgun. California also alleged Johnson had a prior conviction for arson. Johnson pled not guilty and denied the prior conviction.

During voir dire at his state court trial, Johnson objected to the prosecutor's use of a peremptory challenge to strike the only African-American (Mrs. Nichols-Garland) in the venire and moved for a mistrial.[2/] The prosecutor had passed three times on a panel that included Mrs. Nichols-Garland. When challenged, but without any finding of a prima facie case of unconstitutional conduct, the prosecutor stated his race-neutral reasons for exercising the peremptory challenge were: (1) his belief that Mrs. Nichols-Garland had previously worked for a defense attorney; (2) she was uneducated; (3) her answers were evasive; and (4) her age. The state court trial judge denied Johnson's motion for a mistrial impliedly finding the prosecutor honestly excused Mrs. Nichols-Garland for race-neutral reasons. Following a jury trial, Johnson was found guilty as charged and the prior conviction was found to be true. Johnson was sentenced to 13 years and 8 months in state prison.

Johnson appealed his case to the California Court of Appeal alleging the prosecutor improperly excused Mrs.

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2. The pertinent portion of the Reporter's Transcript from Johnson's trial is reproduced in Appendix H of this Petition.

Nichols-Garland because of her race.[3/] The California Court of Appeal reviewed the record. It found the prosecutor offered race-neutral reasons which included: (1) Mrs. Nichols-Garland had worked for a defense lawyer; and (2) Mrs. Nichols-Garland was evasive in answering voir dire questions. The California Court of Appeal held it was inconsequential that Mrs. Nichols-Garland had in fact been employed by a family law practitioner rather than a criminal defense attorney because the California Court of Appeal found the record demonstrated both parties as well as the trial judge were under the mistaken belief that Mrs. Nichols-Garland had been employed by a criminal defense lawyer. Thus, the California Court of Appeal rejected Johnson's contention by deferring to the trial judge's determination that the prosecutor's reasons, as a whole, showed the preemptory challenge was exercised on the basis of specific bias.

Johnson then entered federal district court where the magistrate-judge ordered an evidentiary hearing to further explore the prosecutor's reasons for striking Mrs. Nichols-Garland. The prosecutor testified at the evidentiary hearing and reiterated his race-neutral reasons. The magistrate-judge, like the state court trial judge, believed the prosecutor's explanation that he did not excuse Mrs. Nichols-Garland on the basis of race, and made a factual finding to that effect. These factual findings of the magistrate-judge were expressly adopted

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3. The pertinent portion of the opinion filed by the California Court of Appeal is reproduced in Appendix I of this Petition.

by William P. Gray, United States District Judge, who denied the petition for writ of habeas corpus.

Johnson then appealed to the Ninth Circuit which reversed his conviction in a 2-1 published decision. The majority reweighed the facts underlying the factual findings made by the state and district courts and held there was insufficient factual support for a finding that the prosecutor excused Mrs. Nichols-Garland for race-neutral reasons. A well-reasoned and very critical dissent was filed by Circuit Judge Thompson.

California filed a petition for rehearing and suggestion for rehearing *en banc* arguing, in pertinent part, that the majority of the Ninth Circuit panel improperly reweighed evidence presented to the state court and district court concerning the prosecutor's reasons for excusing Mrs. Nichols-Garland and, based on a cold record, impermissibly substituted its own determination for the state and district court's factual findings regarding the prosecutor's credibility. Circuit Judge Thompson voted to grant the petition for rehearing but Circuit Judge Canby (the author of the opinion) and Circuit Judge Boochever voted to deny the petition for rehearing. California's request for a rehearing *en banc* was denied.

REASONS WHY THE WRIT SHOULD ISSUE

The Ninth Circuit violated well established principles of federalism and comity when it refused to respect the presumption of correctness accorded state court findings of facts in 28 U.S.C. § 2254 cases, and holding a prosecutor's facially race-neutral reasons for exercising a peremptory challenge were insufficient to overcome a *Batson* challenge even though the prosecutor's reasons were credited as honest and bonafide by the state court trial judge and the state court of appeal.

The state court trial judge made findings of fact in concluding the prosecutor's race-neutral reasons for excusing Mrs. Nichols-Garland were honest and bonafide. This finding was based on an evaluation of the prosecutor's credibility, as well as Mrs. Nichols-Garland's demeanor during jury selection process. After reviewing the record, the state court of appeal held it was "appropriate to defer to the trial court's determination that the prosecutor's reasons, taken as a whole, showed the peremptory challenge was exercised on the basis of specific bias."

The finding of the state court trial judge, as well as the finding of the state appellate court, are supposed to be entitled to a "presumption of correctness" under 28 U.S.C. § 2254 and accorded "great deference" by federal reviewing courts. *Hernandez v. New York*, ___ U.S. ___, 111 S. Ct. 1859, 1869; 114 L. Ed. 2d 395 (1991); *Wainwright v. Witt*, 469 U.S. 412, 426, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985); *Sumner v. Mata*, 455 U.S. 591,

592-93, 597-98, 102 S. Ct. 1303, 71 L. Ed. 2d 591 (1981). This deference exists because "[i]n the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed . . . [E]valuation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province.'" *Hernandez v. New York*, ___ U.S. ___, 111 S. Ct. 1859, 1869, 114 L. Ed. 2d 395 (1991), quoting *Wainwright v. Witt*, 469 U.S. 412, 428, 105 S. Ct. 844, 854, 83 L. Ed. 2d 841 (1985); *See also*, *Batson v. Kentucky*, 476 U.S. 79, 98, n.21, 106 S. Ct. 1712, 1724, n.21, 90 L. Ed. 2d 69 (1986). The Ninth Circuit, however, has blatantly violated these rules.

This Ninth Circuit ruling, if permitted to stand, will have cancerous ramifications for future cases because it has established precedent for federal courts of appeal to scoff at the presumption of correctness normally accorded state court findings of fact under 28 U.S.C. § 2254. The Ninth Circuit now empowers courts of appeal to sit as finders of fact and substitute their factual determinations for factual determinations that are uniquely within the province of the state court trial judge and have been credited by the state court of appeal.

The Ninth Circuit refused to respect the deference and presumption of correctness accorded the state courts in making these determinations and on a cold record held "there is insufficient support in the record for a trier of fact to find that Mrs. Nichols-Garland . . . was removed from the jury for other than racial reasons."

Slip Op. at 9503-04.[4/] In so concluding, the Ninth Circuit erroneously reexamined the credibility of the prosecutor and the characteristics of Mrs. Nichols-Garland without having had the opportunity to observe their demeanors, mannerisms, and other factors only available to the judge who presided over the state court trial.

The prosecutor provided race-neutral reasons to the state court trial judge for excusing Mrs. Nichols-Garland which included: (1) his belief that Mrs. Nichols-Garland had previously worked for a defense attorney; (2) she was uneducated; (3) her answers were evasive; and (4) her age. The Ninth Circuit acknowledged these reasons were race-neutral but determined the context of these reasons demonstrated they were a pretext for excusing Mrs. Nichols-Garland on the basis of race. In other words, the Ninth Circuit, on a cold record, made an independent judgment of the prosecutor's candor and ruled the prosecutor was not truthfully disclosing his reasons to the state court judge. The analysis of the Ninth Circuit is deeply flawed and, in fact, illustrates the importance of according state courts a presumption of correctness and deference when ruling on *Batson* challenges which hinge on the prosecutor's credibility.

First, the Ninth Circuit rejected the prosecutor's honest belief that Mrs. Nichols-Garland had worked for a defense attorney by citing the portion of the record which demonstrates she had instead been employed by

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4. "Slip Op." refers to the slip opinion of the Ninth Circuit, attached to this Petition as Appendix A.

a lawyer who practiced marriage and divorce law. Slip Op. at 9502. Of course, it is the prosecutor's honest belief, rather than the factual support for the reason, which governs the racial neutrality of this reason. The record does suggests Mrs. Nichols-Garland was not employed by a defense attorney. However, the record demonstrates, and the state court of appeal specifically made a factual finding, that defense counsel, the prosecutor and the trial judge shared the same mistaken belief that Mrs. Nichols-Garland stated she had been employed by a defense attorney. Indeed, the record does not demonstrate the prosecutor's misperception was ever challenged or corrected by either the state court trial judge or defense counsel. Thus, the record demonstrates there was a mistaken, *but honest*, belief Mrs. Nichols-Garland had worked for a criminal defense attorney. In rejecting this reason the Ninth Circuit has done the impossible -- it has determined, from a cold record, that the prosecutor was lying when he said he honestly believed Mrs. Nichols-Garland had worked for a defense attorney.

Second, the Ninth Circuit attacked the prosecutor's representation that he did not believe Mrs. Nichols-Garland was well educated. Slip Op. at 9502. The Ninth Circuit concluded the transcript of the jury voir dire "indicates [prospective juror Nichols-Garland] spoke excellent English, gave intelligent responses, and chose her words well." Slip Op. at 9502. Again, the Ninth Circuit substituted its judgment for that of the state court trial judge -- an individual clearly in a better position to evaluate the sophistication of a witness including how

enlightened or educated she appears when answering questions.

The Ninth Circuit's conclusion that Mrs. Nichols-Garland's position as an "assistant" to the head of a company's sales service department "strongly suggests she was sufficiently educated to serve on the jury" is just one demonstration of the rationale behind the requirement of great deference to the trial judge's factual findings. There is nothing in the record to assist the appellate court in determining the education required to be an "assistant" at the company. Indeed, the skill required for such a position might have no educational requirement whatsoever. Thus, the Ninth Circuit's conclusion that Mrs. Nichols-Garland's position suggested she was educated is based on pure speculation. Under such circumstances, the trial judge's evaluation of the witness' apparent educational background as it is revealed by the manner in which she answers questions must be given deference.

Third, the Ninth Circuit cast disbelief on the prosecutor's explanation that Mrs. Nichols-Garland appeared evasive noting her responses were "usually pithy and direct." Slip Op. at 9502-03. Clearly, compared to the trial judge, appellate courts are in difficult position to evaluate the evasive nature of a witness. "Evasive" is defined by Webster's New World Dictionary as: "1. tending or seeking to evade; not straightforward; tricky; equivocal 2. hard to catch, grasp, etc.; elusive." *Webster's New World Dictionary* 470 (3rd ed. 1988). Thus, by definition this characteristic can often only be determined by a personal observation of a

witness' demeanor. At first glance, an answer might not appear "tricky" or "elusive" on the cold record but is in fact "tricky" or "elusive" when considered in the context of the testimony and mannerisms as a whole. In the case at bar, Mrs. Nichols-Garland's responses to questions were often one word -- clearly giving rise to the possibility that she might have been attempting to cleverly avoid revealing other personal characteristics. The Ninth Circuit simply did not have the tools to make a definitive determination of whether Mrs. Nichols-Garland was evasive.

Fourth, the Ninth Circuit characterized the prosecutor's reason of Mrs. Nichols-Garland's age as "terse" and opined there was nothing in the record to reveal the age of Mrs. Nichols-Garland. Slip Op. at 9503. However, *personal observation* of Mrs. Nichols-Garland would obviously provide a general impression of her age. Although the Ninth Circuit had no opportunity to observe Mrs. Nichols-Garland, it bluntly wrote, "[T]here is no factual basis to support the age explanation . . . ." Slip Op. at 9503. To the contrary, the approximate age of the witness must have been clear to the prosecutor and the trial judge as an appropriate race-neutral explanation simply from her physical appearance.

In an attempt to extrapolate group bias from the record, the Ninth Circuit cites the prosecutor's comments that he had been willing to accept Mrs. Nichols-Garland (passing on the panel three times with her included) but his position changed while he observed defense counsel excluding other prospective jurors on the basis of race.

Slip Op. 9501. The Ninth Circuit, however, failed to recognize the state trial judge impliedly believed (and the district court specifically found) the prosecutor's remarks were not a demonstration of group bias, but rather, simply illustrated the prosecutor's indignation that defense counsel was excusing certain jurors because of race and was hypocritically accusing the prosecutor of that same injustice. Moreover this comment cannot be viewed in a vacuum, especially when (1) the state court of appeal opinion held the prosecutor's reasons, *as a whole*, demonstrated the preemptory challenge was exercised on the basis of specific bias; and (2) the prosecutor's reasons were a function of his evaluation of the jury box as a whole, rather than retaliation for the defense counsel's peremptory challenges of minorities.

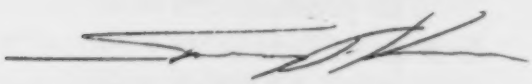
The presumption of correctness accorded state court findings of facts in 28 U.S.C. § 2254 does not permit the Ninth Circuit to find a state court prosecutor's facially race-neutral reasons for exercising a preemptory challenge are insufficient to overcome a *Batson* challenge when the prosecutor's reasons have been credited as honest and bonafide by the state court trial judge and the state court of appeal. This case demonstrates the aberrant results when the concepts of federalism and comity provided for in 28 U.S.C. § 2254 are ignored by federal courts of appeal.

CONCLUSION

For these reasons, petitioner requests a writ of certiorari issue to the Ninth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANDRE JOHNSON,
Petitioner-Appellant,

v.

DANIEL B. VASQUEZ, Warden,
Respondent-Appellee.

No. 91-56395
D.C. No.
CV-90-2033-WPG
OPINION

Appeal from the United States District Court
for the Central District of California
William P. Gray, District Judge, Presiding

Argued and Submitted
December 7, 1992—Pasadena, California

Filed September 2, 1993

Before: William C. Canby, Jr., Robert Boochever, and
David R. Thompson, Circuit Judges.

Opinion by Judge Canby; Dissent by Judge Thompson

SUMMARY

Criminal Law and Procedure/Juries

The court of appeals reversed an order of the district court and remanded. The court held that there was insufficient factual support for a finding that an African-American venireperson was peremptorily challenged for other than racial reasons.

Petitioner Andre Johnson, an African-American, was convicted by a state jury of robbery. One member of the trial

venire, Mrs. Nichols-Garland, was African-American and was impaneled. Subsequently, the prosecutor thrice passed the panel. Then, after Johnson's counsel struck an Asian-American man who indicated that understanding spoken English might be difficult, the prosecutor challenged Nichols-Garland. The defense objected.

The prosecutor stated that he had passed multiple times, bending over backward to keep Nichols-Garland because she was the only African-American woman, until the defense challenge of the Asian-American, which the prosecutor interpreted as jury-loading. The prosecutor further stated that he challenged Nichols-Garland because of her age, because she had worked for the past six months for a defense attorney, because he perceived her as uneducated, and because she was evasive during voir dire. The trial court did not find that Johnson had shown purposeful discrimination. The record showed that Nichols-Garland was employed as assistant to a department head at a manufacturer and distributor of health products. Six months previously, she had worked for an attorney who practiced family law. Her age was not revealed in the record.

Johnson exhausted his state post-conviction remedies and petitioned for writ of habeas corpus in district court. After an evidentiary hearing, the court dismissed the petition. Johnson appealed.

[1] There was a strong indication of racial motivation in the prosecutor's explanation of his challenge. [2] The state and federal records demonstrated that the race-neutral reasons were pretextual. [3] The record belied the assertion that Nichols-Garland had worked for a defense attorney [4] and strongly suggested that she was sufficiently educated to serve as a juror. [5] Further, rather than evasiveness, the record showed responses that were pithy and direct. [6] Finally, the prosecutor failed to factually support his objection to Nich-

ols-Garland's age, rendering it insufficient to support a finding of race-neutrality in his challenge.

Judge Thompson, dissenting, opined that the majority's analysis improperly shifted the burden to the prosecutor and substituted its own factfinding for that of the district court.

COUNSEL

William S. Harris, Stewart & Harris, Pasadena, California, for the petitioner-appellant.

David F. Glassman, Deputy Attorney General; Sanjay T. Kumar, Deputy Attorney General; Los Angeles, California, for the respondent-appellee.

OPINION

CANBY, Circuit Judge:

Andre Johnson, a California prisoner, appeals from the district court's judgment that dismissed his petition for a writ of habeas corpus. Johnson alleges that the state prosecutor excused an African-American woman from the venire on the basis of her race, thereby violating the Equal Protection Clause as interpreted by the Supreme Court in *Batson v. Kentucky*, 476 U.S. 79 (1986). A state appellate court rejected on direct appeal an analogous claim made under the California Constitution. The district court rejected Johnson's *Batson* claim after an evidentiary hearing. We reverse the judgment, and remand the case to the district court with instructions to issue the writ.

I

A jury convicted Johnson of twice robbing a convenience store located in Torrance, California. Johnson, who is

African-American, received a sentence of 13 years and eight months in state prison.

Jury selection in Johnson's case took place on December 15, 1986, in Los Angeles County Superior Court. The venire consisted of twenty-six persons, from whom twelve jurors and two alternates were to be selected. Only one member of the venire, a Mrs. Nichols-Garland, was African-American.

The prosecutor and Johnson's trial counsel agreed to excuse two members of the venire for cause. Johnson's counsel used three peremptory challenges, but the prosecutor passed three additional times upon a panel that included Mrs. Nichols-Garland before challenging one potential juror and excusing another for cause. Johnson's counsel then challenged a Mr. Li, who is Asian-American, after Mr. Li had indicated that he might have difficulty understanding spoken English. Johnson's counsel next questioned another potential juror whom the prosecutor passed for cause.

The prosecutor peremptorily challenged Mrs. Nichols-Garland immediately thereafter. Johnson's counsel protested. The trial court asked the prosecutor for an explanation. The prosecutor said:

> First of all, I passed four times and allowed counsel to have whatever juror he wanted. Then as I saw him excluding people from particular races, notably Mr. Li, I decided that, one, I didn't want a young woman named Garland on the jury because of her age; and two, she worked for defense attorneys and that was another reason why I excused her.
>
> And I feel that the defendant at this point was starting to load up the jury. And I felt that I would not get a fair trial based on the panel as it presently is constituted . . .

> Mrs. Garland, I felt also was uneducated and evasive in her responses to my questions. But particularly since she worked for a defense attorney, and had done so for the past six months, I felt that for those reasons alone and not for any reasons of race, I would excuse her.

"I bent over backward to keep [Mrs. Nichols-Garland] on the jury because she was the only black woman," the prosecutor maintained.

Johnson moved for a mistrial. The trial court summarily denied the motion from the bench. Johnson renewed his objection to the manner of jury selection in a motion for a new trial. The trial court denied that motion in a minute order.

On direct appeal, Johnson asserted that the prosecutor had excluded Mrs. Nichols-Garland because she is African-American. The California Constitution bars the use of peremptory challenges "to remove prospective jurors on the sole ground of group bias." *People v. Wheeler*, 583 P.2d 748, 761-62 (Cal. 1978). The California Court of Appeal determined that no *Wheeler* error had occurred at Johnson's trial. *People v. Johnson*, No. B026468 (Cal.Ct.App. June 15, 1988). It found that the prosecutor had offered explanations which indicated the existence of specific bias; namely, that Mrs. Nichols-Garland had worked for a defense attorney and that she had been evasive in answering questions. *Id.*, slip op. at 9. The court determined that those explanations were no pretext, but were the actual causes that had induced the prosecutor to excuse Mrs. Nichols-Garland. *See id.*

After exhausting state court remedies, Johnson sought habeas relief in federal court under 28 U.S.C. § 2254. Johnson maintained that the state prosecutor had challenged Mrs. Nichols-Garland because of her race, in violation of *Batson*. A federal magistrate conducted an evidentiary hearing and recommended that the district court dismiss the petition on the

merits. The magistrate concluded that the prosecutor had offered race-neutral explanations for his conduct that were the actual motivations for the challenge. The district court adopted the magistrate's report without modification and dismissed the petition. Johnson appealed, and we have jurisdiction under 28 U.S.C. § 2253.

II

We review de novo the district court's decision to deny Johnson's petition. *Adams v. Peterson*, 968 F.2d 835, 843 (9th Cir. 1992) (en banc), *cert. denied*, 113 S.Ct. 1818 (1993).[1] We will overturn the district court's underlying fact findings only to correct clear error. *Thomas v. Brewster*, 923 F.2d 1361, 1364 (9th Cir. 1991).

Johnson seeks habeas relief under the process outlined in *Batson*. That process includes three inquiries. The first is whether the defendant has made a prima facie showing that the prosecutor challenged on the basis of race. The second is whether the prosecutor has articulated a facially race-neutral explanation for his or her action. The third is whether the defendant has carried his or her ultimate burden of proving purposeful discrimination. *Hernandez v. New York*, 111 S.Ct. 1859, 1866 (1991) (plurality op.) The first inquiry is inapplicable here.[2] Because the prosecutor has given reasons for excusing Mrs. Nichols-Garland that may be considered facially race-neutral, we assume without deciding that he carried his burden of production under *Batson*'s second prong.[3]

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[1]No problem relating to retroactivity, procedural default, or successive writs arises in this case.

[2]We need not address the question whether Johnson offered prima facie evidence of intentional discrimination, *see Batson*, 476 U.S. at 96-97, because the prosecutor offered an explanation for the challenge, and the trial court ruled on the ultimate question of discrimination. *Hernandez*, 111 S.Ct. at 1866.

[3]We express no opinion on the issue whether a mixed-motive defense in *Batson* jury challenge cases is a valid one. *See, e.g., Howard v. Senkowski*, 986 F.2d 24, 30 (2d Cir. 1993) (holding that *Batson* cases are subject to a dual-motivation analysis).

We therefore ask whether Johnson carried his burden of proving intentional discrimination. *Batson*, 476 U.S. at 98.

The district court's ultimate finding that no intentional discrimination occurred at Johnson's trial is a finding of fact which we review for clear error. *Hernandez*, 111 S.Ct. at 1868-69; *United States v. Bishop*, 959 F.2d 820, 826-27 (9th Cir. 1992). We further begin with the presumption that the analogous finding of the state court of appeal is correct. *Sumner v. Mata*, 449 U.S. 539, 547 (interpreting 28 U.S.C. § 2254(d)).

[1] We observe at the outset that there is a strong indication in the prosecutor's explanation to the trial court that his challenge was, in fact, racially based. The prosecutor said, in the same breath in which he said he had excluded Mrs. Nichols-Garland on the basis of her age and occupation, that *he had been willing to accept* Mrs. Nichols-Garland, but that his position changed when he saw defense counsel "excluding people from particular races, notably Mr. Li. . . ." This contemporary statement strongly suggests that the prosecutor responded to defense counsel's alleged exclusions of other minority venire members by excluding a member of defendant's race. What, then, did the prosecutor present to counter this strong suggestion?[4]

[2] The prosecutor offered the state trial court four justifications that could serve as neutral reasons for his challenge: (1) that Mrs. Nichols-Garland had worked for a defense attorney; (2) that she was uneducated; (3) that she had been evasive in answering questions; and (4) that her age was a problem.[5]

[4] We disagree with the dissent's view that, by posing this question, we shift the burden of proof to the prosecutor. We are simply unfolding the record; the prosecutor did offer four reasons for his challenge. The burden remains with Johnson to show that these reasons were pretextual and that the true reason for the challenge was racial.

[5] During his explanation, the prosecutor referred to another juror, a Mrs. Gerald, whom he had excused because she worked for a grocery chain. The voir dire transcript reveals that Mrs. Nichols-Garland worked for Neutrogena, a manufacturer and distributor of health products.

After reviewing thoroughly the transcripts of the voir dire proceeding and the federal evidentiary hearing, we are convinced that Johnson carried his burden of proving intentional discrimination by establishing that the prosecutor's four race-neutral explanations were a pretext for excluding Mrs. Nichols-Garland from the jury because of her race. Accordingly, we find that the voir dire transcript fails to support the state appellate court's finding to the contrary. We further determine that the district court clearly erred in failing to grant Johnson habeas relief.

[3] The record undermines the prosecutor's statements that Mrs. Nichols-Garland had worked for a defense attorney. Rather, she testified that in the past she had worked for a lawyer "[a]nd it was a marriage and divorce type thing." Nor had she, as the prosecutor asserted, worked for an attorney during the six months preceding jury selection. Instead, she testified that she had "worked for a lawyer six months ago." The prosecutor, at that time, noted accurately her testimony on a jury panel scratch sheet, which the district court admitted into evidence.

[4] There is even less support in the record for the notion that Mrs. Nichols-Garland was uneducated. The transcript of her voir dire indicates she spoke excellent English, gave intelligent responses, and chose her words well. Her position as assistant to the head of the Sales Service Department for Neutrogena, a major manufacturer and distributor of health products, strongly suggests that she was sufficiently educated to serve on any jury.

[5] Furthermore, there was nothing remotely evasive in Mrs. Nichols-Garland's responses to questions. Indeed, they were unusually pithy and direct. For example, when asked whether defense counsel's prior references to race during voir dire had offended her, she responded simply "It didn't bother me," and "I felt nothing." The prosecutor understandably had difficulty explaining at the evidentiary hearing how that

response had been evasive. "It wasn't evasive or false," he admitted, but maintained, "It was just a way to avoid the question . . .[I]t was a non-responsive answer . . . The answer didn't tell me anything." At the evidentiary hearing, the prosecutor asserted that Mrs. Nichols-Garland's demeanor had shown her evasiveness. However, he never made that observation to the trial court. The prosecutor's after-the-fact explanation on this score is wholly insufficient, in light of the record, to permit the trier of fact to accept evasiveness as having been a neutral ground of challenge.

[6] Finally, neither the voir dire transcript, the evidentiary hearing transcript, nor the prosecutor's jury panel sheet (the only exhibit in the record) reveals Mrs. Nichols-Garland's age. Whatever it might have been, the prosecutor's terse reference to age in his explanation during voir dire fails to indicate whether he believed her to be too young or too old for the jury. Because there is no factual basis to support the age explanation, it is insufficient to support the district court's finding that age served as a race-neutral ground for removing Mrs. Nichols-Garland from the panel.

In sum, the record before us belies each of the prosecutor's facially race-neutral explanations. In view of the multiple erroneous reasons advanced, we cannot accept the proposition that the prosecutor's alleged mistaken beliefs can support a challenge free of constitutional taint. When there is reason to believe that there is a racial motivation for the challenge, neither the trial courts nor we are bound to accept at face value a list of neutral reasons that are either unsupported in the record or refuted by it. Any other approach leaves *Batson* a dead letter.

We conclude that there is insufficient support in the record for a trier of fact to find that Mrs. Nichols-Garland, the only African-American member of the venire, was removed from

the jury for other than racial reasons. The district court's contrary finding was clearly erroneous.

REVERSED and REMANDED with instructions.

THOMPSON, Circuit Judge, dissenting:

I respectfully dissent.

The majority reverses the district court by retrying a question of fact the district court resolved. The majority does this by examining the cold record. This record shows neither the witnesses' demeanor, pauses in responses to questions, manner of answering, nor the myriad of other factors which a trial judge is uniquely able to observe and rely upon in making findings of fact.

Here the trial judge did what he was supposed to do. He resolved a close question of fact. The state court did the same thing, and its finding of fact on the same issue is presumptively correct. *Sumner v. Mata*, 449 U.S. 539, 547. Now on appeal, the majority tosses all this aside by relying on the *voir dire* transcript from the state trial court, the transcript of the evidentiary hearing before the district court, and an exhibit. The majority's analysis by which it reaches its result is flawed, and with all due respect its decision is wrong.

The majority accepts, as indeed it must, that the prosecutor's reasons for exercising a peremptory challenge to excuse Mrs. Nichols-Garland were facially race-neutral. The majority also acknowledges that the burden shifted to the defendant to prove intentional discrimination. So far so good.

The majority then points out that the prosecutor said he had initially been willing to accept Mrs. Nichols-Garland, but his position changed when he saw defense counsel "excusing

people from particular races, notably Mr. Li." This is where the majority's analysis starts to unravel. It characterizes this statement as a "strong suggestion" that the prosecutor excluded Mrs. Nichols-Garland because of her race. Majority Opinion at p.7. It then puts a questionable spin on the burden of proof by asking: "What, then, did the prosecutor present to counter this strong suggestion?" *Id.*

Poof! Just like that the defendant's burden to prove intentional discrimination disappears. It is replaced by the featherweight of a "suggestion," or perhaps by no weight at all because, according to the majority, the burden has now shifted to the prosecutor to "counter this strong suggestion."

I disagree with this application of the burden of proof. However, even if the game is played by these rules, the defendant still loses. The prosecutor's reference to race was made in the context of a number of reasons he articulated for excusing Mrs. Nichols-Garland as a prospective juror. When the defense accused him of excusing her because of her race, the prosecutor stated:

> First of all, I passed four times and allowed counsel to have whatever juror he wanted. Then as I saw him excluding people from particular races, notably Mr. Li, I decided that, one, I didn't want a young woman named Garland on the jury because of her age; and two, she worked for defense attorneys and that was another reason why I excused her.
>
> And I feel that the defendant at this point was starting to load up the jury. And I felt that I would not get a fair trial based on the panel as it presently is constituted.
>
> I excluded Mrs. Garland because she was a young woman who worked for a grocery chain. And I feel

> her answers were evasive. But I was willing to accept the panel with her.
>
> Mrs. Garland, I felt also was uneducated and evasive in her responses to my questions. But particularly since she worked for a defense attorney, and had done so for the past six months, I felt that for those reasons alone and not for any reasons of race, I would excuse her.
>
> In fact, I bent over backward to keep her on the jury because she was the only black woman. But as counsel eliminated, exercised different peremptories
> . . . .

The only way the prosecutor's facially race-neutral statements can be found to be pretextual is for this court to substitute its factfinding prowess for that of the district court and disbelieve the prosecutor when he said: "I felt that for those reasons alone [her age, limited education, employment at a grocery chain, evasiveness, and the belief that she was employed by defense attorneys] I would excuse her." Were these the real reasons the prosecutor excused Mrs. Nichols-Garland? He said they were.

To determine if he was telling the truth, the district court held an evidentiary hearing. The prosecutor appeared before the court and testified. He explained that the composition of a jury changes when, in the *voir dire* process, one juror is replaced by another. A trial lawyer might be willing to accept one jury mix, but not another.

The prosecutor testified that when Mr. Li was excused and replaced by another juror, he was no longer willing to accept the jury mix with Mrs. Nichols-Garland as a juror. He explained why he excused Mrs. Nichols-Garland, and reiterated that the reasons he excused her had nothing to do with her race. The district court believed him. It made a factual

finding that the prosecutor had not excused Mrs. Nichols-Garland because of her race. I would not disturb this finding, because in my view it is not clearly erroneous.[1]

There is another reason I would affirm. Even if we assume the prosecutor's reasons for excusing Mrs. Nichols-Garland were based in part on her race, the prosecutor gave four race-neutral reasons for excusing her. At worst, the prosecutor had a mixed motive for exercising his peremptory challenge. Although the majority avoids the issue (Majority Opinion p.6, n.3), I would apply a mixed-motive defense to the prosecutor's statements as the Second Circuit did in *Howard v. Senkowski*, 986 F.2d 24, 27 (2d Cir. 1993).

In *Howard*, the prosecutor conceded that race had been a factor in his peremptory challenge. *Id.* at 25. He articulated other race-neutral reasons for his peremptory challenge. *Id.* The Second Circuit applied a mixed-motive analysis in considering the question whether the prosecutor's challenge would have been made even without the improper motivation. *Id.* at 26-30. The court drew upon the Supreme Court's explanation of how the dual-motivation analysis operates in the context of a discrimination case. *Id.* at 26-27, discussing *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. at 265-66. The Second Circuit concluded that because the prosecutor was guilty of acting in part from improper motives, the burden shifted to him to show that he would have exercised his peremptory challenge regardless of the improper motive. *Howard*, 986 F.2d at 30. The district court had not considered this kind of analysis, and to permit

[1]The district court further noted that the record showed that during *voir dire* the prosecutor repeatedly tried to remove race as an issue in the case. It was defense counsel who repeatedly referred to race and questioned jurors about it. "The prosecutor took pains to tell the jurors that race had nothing to do with the case." *Johnson v. Vasquez*, No. CV 90-2033-WPG (GHK), U.S. Dist. Ct., C.D. Cal., Report and Recommendation of Magistrate Judge filed Sept. 10, 1991, p.9.

it to do so the Second Circuit remanded the case to the district court.

In the present case, the district court found that the prosecutor excused Mrs. Nichols-Garland for race-neutral reasons. This is the equivalent of finding that the prosecutor would have excused her regardless of any asserted improper motive. Remand is unnecessary. I would affirm.

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APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FILED: September 10, 1991

ANDRE JOHNSON, Petitioner, v. DANIEL VASQUEZ, et al., Respondents.	NO. CV 90-2033-WPG(GHK) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is filed pursuant to 28 U.S.C. § 636 and General Order No. 194 of the United States District Court for the Central District of California.

Background

Petitioner originally filed this petition in the Northern District of California. It was transferred to our court on April 23, 1990. Thereafter, respondents filed a return and petitioner filed a traverse.

On August 24, 1990, we appointed counsel to represent petitioner. Thereafter, we heard oral argument, considered further briefing, and held an evidentiary hearing. Having now considered the post-hearing briefs, this matter is ready for decision.

Petitioner's Contention

Petitioner's sole contention is that the prosecutor committed *Batson*[1] error when he used a peremptory challenge to exclude Ms. Beverly D. Nichols-Garland ("Garland"), allegedly the only black juror on the jury panel.

Summary of Pertinent Facts

Jury selection commenced on December 15, 1986. Twelve potential jurors and two alternates were present. Ms. Garland was a potential juror, and the only black in either group.

In response to the court's questions to the jurors as to whether any of them, their relatives or close friends had ever been involved in the legal system, Ms. Garland replied: "Yes, I worked for a lawyer six months ago. And it was a marriage and divorce type thing." (RST at 9).[2]

In response to questions that were written on the blackboard in the courtroom to be answered by all the jurors, Ms. Garland replied: "[I] live in Inglewood. And I work at Nutrigena Corporation. And I am married. And I have no kids. And my husband works at

---

1. *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986).

2. RST refers to Reporter's Supplemental Transcript on Appeal.

International Light Metals Corporation as a furnace attender." (RST at 16).

In response to further questioning regarding her work, she replied: "I work in the Sales Service Department. I am assistant to the lead." (*Id.*)

After asking jurors about possible bias against blacks, defense counsel and Ms. Garland engaged in the following colloquy:

> Q. [By defense counsel]: You are black, and I realize that. But I am going to ask the question almost in a reverse way.
>
> A. Okay.
>
> Q. Have you had experiences as a black person that would cause you to feel that the system in quotation marks, society, is against black people and that black people can't get a fair shake so that in this case you would be biased or prejudiced for Mr. Johnson just because he is black?
>
> A. No.
>
> Q. Have you had experiences that would cause you to feel that most black people are bad because of any experiences you may have had?
>
> A. No.
>
> Q. Do you feel you can be fair and impartial?
>
> A. Yes.
>
> Q. I am speaking on the race aspect now.
>
> A. Yes.

(RST at 28).

Subsequently, the prosecutor questioned Ms. Garland as follows:

> Q. [By the prosecutor]: Mrs. Garland, the racial issue was brought up by Mr. Friedman. How did you feel when that was brought up?
>
> A. It didn't bother me.
>
> Q. Do you think it is something that should be brought up?
>
> A. Well, I don't quite remember what was said. Could you refresh my memory?
>
> Q. Sure. The defendant is a black gentleman. Do you think that when that was brought out to you, obviously you see him, but when that was emphasized, I guess by bringing it out by the defense, how did you feel?
>
> A. I felt nothing.
>
> Q. Okay. Would you agree that that plays no part in this trial?
>
> A. I agree.
>
> Q. If the evidence convinced you the defendant is guilty, would you vote guilty?
>
> A. Yes, I would.

(RST at 55).

The prosecutor passed the panel for peremptory challenges on several occasions. (RST at 67, 72, and 80). Then, when the prosecutor challenged Ms. Garland, defense counsel asked to approach the bench. (RST at 108). Counsel pointed out that there was only

one black among all the jurors, and said he felt the prosecution's challenge of Ms. Garland was a deliberate and discriminatory attempt to exclude the only black on the panel. (RST at 108-109).

Without making any specific finding that counsel had established a prima facie case, the court turned to the prosecutor for an explanation. (RST at 109).

The prosecutor replied as follows:

> . . . I passed four times and allowed counsel to have whatever juror he wanted. Then as I saw him excluding people from particular races, notably Mr. Li, I decided that, one, I didn't want a young woman named Garland on the jury because of her age; and two, she worked for defense attorneys and that was another reason why I excused her.
>
> And I feel that the defendant at this point was starting to load up the jury. And I felt that I would not get a fair trial based on the panel as it presently is constituted.
>
> I excluded Mrs. Gerald because she was a young woman who worked for a grocery chain. And I feel her answers were evasive. But I was willing to accept the panel with her.
>
> Mrs. Garland, I felt also was uneducated and evasive in her responses to my questions. But particularly since she worked for a defense attorney, and had

done so for the past six months, I felt that for those reasons alone and not for any reasons of race, I would excuse her.

(RST at 109).

The prosecutor then described his other challenges, pointing out that he had challenged three whites, one black, and one Mexican. (RST at 110).

Defense counsel asked the court to declare that the jury panel had been tainted and that his client was not given a fair and impartial jury panel of the cross section of the community. The court denied that request. (*Id.*)

At the evidentiary hearing on this habeas petition, the prosecutor testified that he thought Ms. Garland had worked for a defense attorney, even though the record indicates that she had worked for a domestic relations attorney.[3/] He said that he did not challenge Ms. Garland on the basis of race. Rather, he was frustrated by defense counsel's repeated use of his peremptory challenges such that he did not feel he could accept Ms. Garland on the jury as it was then constituted.

While he was willing to accept Mr. Garland, and indeed did accept her on repeated occasions, the change in the make-up of the jury as a result of the defense challenges caused him to exclude Ms. Garland because he thought she had worked for a defense attorney, was

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3. We note that the prosecutor's misperception was not challenged or corrected by either the court or defense counsel during the trial.

uneducated, and was evasive in her answers. (EHT at 15-17, 37-39).[4]

Discussion

In *Baston v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986), the Supreme Court set out a three-step process for evaluating claims that the prosecutor had violated the Equal Protection Clause in his use of peremptory challenges.

First, petitioner must make out a prima facie showing that the prosecutor exercised a peremptory challenge on the basis of race. *Id.* at 96-97, 106 S. Ct. at 1722-23. Second, if such showing is made, the burden shifts to the prosecutor to articulate a race-neutral reason for the use of the peremptory challenge. *Id.* at 97-98, 106 S. Ct. at 1723-24. Third, the trial judge must determine whether petitioner has carried his burden of proving purposeful discrimination. *Id.* at 98, 106 S. Ct. at 1723.

In this case, the trial court did not rule on whether petitioner had made out a prima facie case. If the prosecutor set forth a race-neutral explanation, and the trial court made its ultimate finding, the question of whether petitioner had initially sustained his burden of showing a prima facie case is moot. *Hernandez v. New York*, ___ U.S. ___, 111 S. Ct. 1859, 1866 (1991).

---

4. EHT refers to Evidentiary Hearing Transcript.

Our first inquiry is whether the prosecutor set forth race-neutral reasons. Here, he said that he challenged Ms. Garland because the constitution of the jury panel had changed sufficiently as a result of repeated defense peremptory challenges that he could not justify permitting an apparently uneducated juror who gave evasive answers and who worked for a criminal defense attorney to remain on the panel.

We find that the prosecutor gave race-neutral explanations.

> A neutral explanation in the context of our analysis here means and explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.

Id.

Petitioner argues that because the prosecutor referred to the defense strike of Mr. Li, a juror of apparent Asian descent, his exercise of the peremptory to exclude Ms. Garland was actually a retaliatory racial strike.

While the prosecutor's intent is relevant in the final step of the *Batson* analysis, we do not find that the prosecutor's reference to Mr. Li, as ambiguous as it was,

produced a situation where "discriminatory intent [was] inherent in the prosecutor's explanation . . ." *Id.*[5]

Because the prosecutor offered race-neutral explanations, our second inquiry is whether the trial court made a proper finding that petitioner had not sustained his burden of showing purposeful discrimination. In our review, we must give great deference to the trial judge's finding on this issue. *Id.* ___ U.S. ___, 111 S. Ct. at 1868.

We are aware that the prosecutor, in providing his explanation, referred to defense counsel's exclusion of an apparent Asian juror, Mr. Li. We are likewise cognizant that one explanation of this reference is that the prosecutor used a racially retaliatory strike. That is, since defense counsel challenged on the basis of race (i.e. Mr. Li), he retaliated by striking Ms. Garland.

Having reviewed the complete record, including the prosecutor's answers at the evidentiary hearing, we are confident that under the totality of circumstances, the trial judge did not err in concluding that petitioner had not sustained his burden of proving purposeful discrimination.

The record shows that the prosecutor repeatedly tried to remove race as an issue in this case. Although defense counsel repeatedly referred to race, and questioned the jurors thereon, the prosecutor took pains

---

5. Of course, we must review the reference to Mr. Li in the context of whether the race neutral explanations by the prosecutor were merely pretextual of his true intent to discriminate on account of race. *Hernandez*, ___ U.S. ___, 111 S. Ct. at 1867-68.

to tell the jurors that race had nothing to do with the case.

Moreover, the prosecutor's explanations do not appear to be pretextual. Ms. Garland worked in a job which does not appear to have required much, if any, education. Her answers to the prosecutor's questions can be fairly characterized as evasive (or at least inattentive), and the prosecutor thought, albeit mistakenly, that she had worked for a criminal defense lawyer.

While at first blush the reference to Mr. Li is troublesome, when viewed in the context of the prosecutor's statements and his explanations at the evidentiary hearing, we conclude that such reference does not show an intentional and racially motivated use of the peremptory challenge, but merely an indication of the prosecutor's outrage that defense counsel, who had used race as an issue during the voir dire, would dare accuse the prosecutor of racially motivated use of his peremptory challenges. (EHT at 13). That reference was a notation of defense counsel's hypocrisy, and was merely preliminary to the prosecutor's race-neutral explanations.

Conclusion

The Magistrate Judge recommends that the District Judge issue an order (1) denying this petition for writ of habeas corpus (2) dismissing this action on the merits, and (3) approving and adopting this Report and Recommendation.

Dated: This 10th day of September, 1991

GEORGE H. KING
United States Magistrate Judge

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FILED: October 3, 1991

ANDRE JOHNSON,	)	NO. CV 90-2033-WPG(GHK)
	)	
Petitioner,	)	
	)	
v.	)	ORDER ADOPTING
	)	FINDINGS, CONCLUSIONS,
DANIEL VASQUEZ,	)	AND RECOMMENDATIONS
et al.,	)	OF UNITED STATES
	)	MAGISTRATE JUDGE
Respondents.	)	
	)	

Pursuant to 28 U.S.C. § 636, the court has reviewed the petition, all of the records and files herein, and the attached Report and Recommendation of the United States Magistrate Judge. The court, having conducted a *de novo* review of the Magistrate Judge's Report and Recommendation to which Objections were interposed, approves and adopts the Magistrate Judge's findings, conclusions, and recommendations.

IT IS HEREBY ORDERED that this action is dismissed on the merits.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Order, together with the Magistrate Judge's Report and Recommendation, and the Judgement herein, by United States mail, on the petitioner and on the Attorney General for the State of California.

DATED: This 3 day of October, 1991.

WILLIAM P. GRAY
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LODGED: September 10, 1991
ENTERED: October 8, 1991
FILED: October 3, 1991

ANDRE JOHNSON,	)	NO. CV 90-2033-WPG(GHK)
	)	
Petitioner,	)	
	)	
v.	)	JUDGMENT
	)	
DANIEL VASQUEZ, et al.,	)	
	)	
	)	
Respondents.	)	
	)	

Pursuant to the Order of the court adopting the findings, conclusions, and recommendations of the United States Magistrate Judge,

IT IS HEREBY ADJUDGED that this action is dismissed on the merits.

DATED: This 3 day of October, 1991.

WILLIAM P. GRAY
United States District Judge

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED: November 10, 1993

ANDRE JOHNSON,	CA No. 91-56395
	DC No. CV-90-2033-WPG
Petitioner-Appellant.	
v.	
	ORDER
DANIEL VASQUEZ, Warden, et al.,	
Respondents-Appellee.	

BEFORE: CANBY, BOOCHEVER, and THOMPSON, Circuit Judges.

The appellant is instructed to file a response to the petition for rehearing and suggestion for rehearing en banc. The response shall not exceed fifteen (15) pages in length and shall be filed on or before December 3, 1993 and should address the question of whether the decision in this case conflicts with *Palmer v. Estelle*, 985 F.2d 456, 459 (9th Cir. 1993), and *United States v. Power*, 881 F.2d 733, 740 (9th Cir. 1989).

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED: February 22, 1994

ANDRE JOHNSON,	CA No. 91-56395
	DC No. CV-90-2033-WPG
Petitioner-Appellant.	
v.	
	ORDER
DANIEL VASQUEZ, Warden, et al.,	
Respondents-Appellee.	

BEFORE: CANBY, BOOCHEVER, and THOMPSON, Circuit Judges

Judge Canby and Boochever have voted to deny the petition for rehearing. Judge Thompson would grant the petition for rehearing. Judges Canby, Boochever and Thompson reject the suggestion for rehearing en banc.

The full court has voted on the suggestion for an en banc rehearing, and a majority of the judges of the court has voted against rehearing en banc. Fed.R.App. P. 35 (b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED: March 11, 1994

ANDRE JOHNSON,	CA No. 91-56395
	DC No. CV-90-2033-WPG
Petitioner-Appellant.	
v.	
	ORDER
DANIEL VASQUEZ, Warden, et al.,	
Respondents-Appellee.	

BEFORE: CANBY, BOOCHEVER AND THOMPSON, CIRCUIT JUDGES.

The motion of respondent Vasquez for a stay of mandate is granted. The mandate is stayed for thirty (30) days from the date of filing of this order. If, prior to the expiration of that period, the Clerk of this court is notified by the Clerk of the Supreme Court of the United States that a petition for certiorari has been filed in this case, then the stay will continue in effect until final disposition of the matter by the Supreme Court.

APPENDIX H

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF-RESPONDENT, VS. ANDRE JOHNSON, DEFENDANT-APPELLANT.	SUPERIOR COURT NO. A 916597

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY
HONORABLE WM. R. HOLLINGSWORTH, JR., JUDGE PRESIDING

REPORTER'S SUPPLEMENT TRANSCRIPT ON APPEAL

APPEARANCES:

FOR PLAINTIFF-RESPONDENT:

JOHN K. VAN DE KAMP
STATE ATTORNEY GENERAL
3580 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90010

FOR DEFENDANT-APPELLANT: IN PROPRIA PERSONA

CAROLE LEE GROSSE, CSR #5936
OFFICIAL REPORTER

PAGES 1 THROUGH 139 INCL.

THE COURT: PEOPLE'S CHALLENGE.

MR. COOPER: THANK YOU, YOUR HONOR. PEOPLE WOULD ASK THE COURT TO THANK AND EXCUSE JUROR NO. 12., MRS. NICHOLS-GARLAND.

THE COURT: MRS. GARLAND, THANK YOU, AND YOU ARE EXCUSED.

THE CLERK: MRS. NOLA J. WILLIAMS; FIRST NAME, N-O-L-A; LAST NAME,
W-I-L-L-I-A-M-S.

MR. FRIEDMAN: YOUR HONOR, COULD COUNSEL AND I APPROACH THE BENCH WITH THE REPORTER, PLEASE?

THE COURT:YES.

THE FOLLOWING PROCEEDING WERE HELD AT THE BENCH.)

MR. FRIEDMAN: THIS IS AN UNUSUAL KIND OF CASE IN ONE SENSE AND THAT IS THAT OF ALL THE PROSPECTIVE JURORS AND ALL THE JURORS THAT HAVE BEEN CALLED ON THE JURY BOX, THERE HAS BEEN ONLY ONE BLACK PERSON THAT HAS BEEN CALLED.

AND MR. COOPER PASSED FOR CAUSE ON SEVERAL OCCASIONS, PASSED HIS PEREMPTORY ON SEVERAL OCCASIONS AND NOW HAS EXCUSED PEREMPTORILY THE ONE BLACK JUROR THAT WE HAVE.

I FEEL THAT THIS IS A DELIBERATE EXCLUSION ON THE PART OF THE PEOPLE TO DEPRIVE MR. JOHNSON OF THE ONLY BLACK PERSON THAT WAS HERE AS A JUROR. AND I WANT THE RECORD TO REFLECT THAT AND ASK THAT THE COURT FIND THAT UNLESS THERE WAS A VALID CAUSE TO EXCUSE HIM, HER, THAT THIS IS DISCRIMINATORY.

THE COURT: MR. COOPER?

MR. COOPER: FIRST OF ALL, I PASSED FOUR TIMES AND ALLOWED COUNSEL TO HAVE WHATEVER JUROR HE WANTED. THEN AS I SAW HIM EXCLUDING PEOPLE FROM PARTICULAR RACES, NOTABLY MR. LI, I DECIDED THAT, ONE, I DIDN'T WANT A YOUNG WOMAN NAMED GARLAND ON THE JURY BECAUSE OF HER AGE; AND TWO, SHE WORKED FOR DEFENSE ATTORNEYS AND THAT WAS ANOTHER REASON WHY I EXCUSED HER.

AND I FEEL THAT THE DEFENDANT AT THIS POINT WAS STARTING TO LOAD UP THE JURY. AND I FELT THAT I WOULD NOT GET A FAIR TRIAL BASED ON THE PANEL AS IT PRESENTLY IS CONSTITUTED.

I EXCLUDED MRS. GARLAND BECAUSE SHE WAS A YOUNG WOMAN WHO WORKED FOR A GROCERY CHAIN. AND I FEEL HER ANSWERS WERE EVASIVE. BUT I WAS WILLING TO ACCEPT THE PANEL WITH HER.

MRS. GARLAND, I FELT ALSO WAS UNEDUCATED AND EVASIVE IN HER RESPONSES TO MY QUESTIONS. BUT PARTICULARLY SINCE SHE WORKED FOR A DEFENSE ATTORNEY, AND HAD DONE SO FOR THE PAST SIX MONTHS, I FELT THAT FOR THOSE REASONS ALONE AND NOT FOR ANY REASONS OF RACE, I WOULD EXCUSE HER.

IN FACT, I BENT OVER BACKWARD TO KEEP HER ON THE JURY BECAUSE SHE WAS THE ONLY BLACK WOMAN. BUT AS COUNSEL ELIMINATED, EXERCISED FOUR DIFFERENT PEREMPTORIES -- AND IN FACT THE COURT IS ALSO AWARE THAT I ALSO CHALLENGED A MRS. ALEXANDER FOR CAUSE, AND I BELIEVE SHE WAS A WHITE WOMAN, AN OLDER WHITE WOMAN WHO SAID SHE COULDN'T BE FAIR.

I ALSO STIPULATED TO MRS. DOHERTY AND MRS. FIMBERS. MRS. DOHERTY FOR CAUSE, I BELIEVE SHE WAS WHITE. MRS. FIMBERS, I THINK SHE WAS MEXICAN. I AM GUESSING, BUT THAT WOULD BE MY GUESS AS TO HER RACE. I ALSO STIPULATED TO HER BEING EXCUSED FOR CAUSE.

AND I CHALLENGED MRS. ALEXANDER, SO THAT IF THE COURT WILL EXAMINE MY RACIAL MOTIVES OF THE TWO, FOUR, FIVE PEOPLE THAT I PARTICIPATED IN, THREE WERE WHITE, ONE WAS MEXICAN, AND ONE WAS BLACK. AND MY OPINION AS TO THEIR RACES

THE COURT:WHAT IS IT YOU ARE ASKING ME TO DO AT THIS TIME, MR. FRIEDMAN?

MR. FRIEDMAN: WELL, DECLARE THAT THIS TRIAL HAS BEEN -- THAT THIS PANEL I SHOULD SAY, THIS PANEL IS UNDULY TAINTED AND THAT MY CLIENT IS

NOT GIVEN A FAIR AND IMPARTIAL JURY PANEL OF THE CROSS SECTION OF THE COMMUNITY.

THE COURT:THAT REQUEST IS DENIED.

APPENDIX I

NOT FOR PUBLICATION
IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,	) No. B026468
Plaintiff and Respondent,	) (Super. Ct. No. A916597)
v.	)
ANDRE JOHNSON,	)
Defendant and Appellant.	)

APPEAL from a judgment of the Superior Court of Los Angeles County, William R. Hollingsworth, Judge. Affirmed.

Harvey Zall, and Frank O. Bell, Jr., State Public Defenders, Monica Knox, Acting State Public Defender, under appointment by the Court of Appeal, W. Dean Freeman and James A. Uyeda, Deputy State Public Defenders, for Defendant and Appellant.

John K. Van de Kamp, Attorney General, Steve White, Chief Assistant Attorney General, Mark Alan Hart, Supervising Deputy Attorney General, Ellen

Birnbaum Kehr, Deputy Attorney General, for Plaintiff and Respondent.

. . . . The instant record does not disclose *Wheeler* error.

There is no evidence in the instant record of a prima facie case of discriminatory use of preemptory challenges against Blacks. The record discloses that the only Black juror from among the panel members chosen for voir dire as a prospective petit juror, was removed by the prosecutor's use of a peremptory challenge. Blacks constitute a cognizable group. (*People* v. *Moss*, *supra*, 188 Cal.App.3d 268, 275.)

However, defendant has not shown that "'from all the circumstances of the case [there is] a strong likelihood that such persons are being challenged because of their group association rather than because of any specific bias. . . .'" (*People* v. *Moss*, *supra*, 188 Cal.App.3d at p. 274.) The representative cross-section rule does not guarantee a jury ". . . that mirrors the demographic composition of the population, or necessarily includes members of his own group. . . ." (*People* v. *Wheeler*, *supra*, 22 Cal.3d at p. 277; *People* v. *Moss*, *supra*, 188 Cal.App.3d at p. 273, fn. 5.)

The defense made no showing that issues of race would be involved in the trial. (See *People* v. *Moss*,

supra, 188 Cal.App.3d at p. 275-278.) Accordingly, this record does not rebut the presumption the prosecutor's use of peremptory challenges was constitutionally permissible. (*People* v. *Rousseau* (1980) 128 Cal.App.3d 526, 536-537; see *People* v. *Dominick* (1986) 182 Cal.App.3d 117, 1194-1195.)

In his offer of the reasons for challenging Ms. Nichols-Garland, the prosecutor stated his belief she had worked for a defense attorney for six months and that she was "evasive" when being questioned. Such reasons do present a "specific bias" which would allow the trial court to find the prosecution had rebutted any inference of group bias created by the challenge to Ms. Nichols-Garland. (See *People* v. *Moss*, *supra*, 188 Cal.App.3d at pp. 280-281.)

It does not matter that the prosecutor was mistaken and Ms. Nichols-Garland actually stated she had been employed six months earlier by a family law attorney. On this record it appears that defense counsel, prosecutor, and the court shared the same mistaken belief that Ms. Nichols-Garland stated she had been employed by a defense attorney. Defense counsel certainly never mentioned or made issue of this error in making his motion. The appellate record does not support appellant's claim that the prosecutor's other

reasons were belatedly invented to disguise the exercise of the peremptory challenge on the basis of group bias alone. It is thus appropriate to defer to the trial court's determination that the prosecutor's reasons, as a whole, showed the peremptory challenge was exercised on the basis of specific bias. (*People* v. *Wheeler*, *supra*, 22 Cal.3d at p. 281; *People* v. *King* (1987) 195 Cal.App.3d 923, 932-933.)

There is nothing in this record that shows that the trial court improperly considered the defense's use of peremptory challenges in determining whether there was *Wheeler* error. (See *People* v. *Snow*, *supra*, 44 Cal.3d at p. 225.)

The trial court properly denied the *Wheeler* motion. (See *People* v. *Wheeler*, *supra*, 22 Cal.3d at pp. 277-278; *People* v. *King*, *supra*, 195 Cal.App.3d at pp. 933-934; *People* v. *Rousseau*, *supra*, 129 Cal.App.3d at pp. 536-537; see *People* v. *Dominick*, *supra*, 182 Cal.App.3d at pp. 1194-1195).

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No. 93-1575

In The

Supreme Court of the United States

October Term, 1993

ARTHUR CALDERON, Warden,

Petitioner,

v.

ANDRE JOHNSON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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12 pp

QUESTION PRESENTED

Whether the Ninth Circuit correctly decided that respondent met his burden of proof under *Batson v. Kentucky*, 476 U.S. 79 (1986), where the record disclosed a "strong indication" of the prosecutor's racial motive for striking the only Black venire member, and where each of the prosecutor's stated reasons lacked even fair support in the record.

PARTIES TO THE PROCEEDING BELOW

Respondent Andre Johnson was the petitioner-appellant in the Court of Appeals.

Daniel B. Vasquez, Warden, was the respondent-appellee in the Court of Appeals. He has been replaced by Arthur Calderon, who is the present petitioner.

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STATEMENT OF THE CASE

This case arises from a federal habeas corpus petition filed by Andre Johnson against California prison officials based on a violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). On December 15, 1986, the prosecutor in Johnson's state robbery trial exercised a peremptory strike to exclude Ms. Beverly Nichols-Garland, the only Black member of the venire. Johnson is also Black.

In response to questioning by the trial court after Johnson moved for a mistrial, the prosecutor stated that he initially had been willing to accept Ms. Nichols-Garland, but changed his mind when he saw defense counsel striking "people from particular races" including "Mr. Li." The prosecutor then stated that he excluded Ms. Nichols-Garland because she had worked for a criminal defense attorney (though the record shows otherwise); because she was uneducated (though the record refutes this); because she had been evasive in answering questions (though the record refutes this also); and because of her age (though there is no support in the record for that claim). The trial court denied the *Batson* challenge and Johnson was convicted.

On direct appeal, the California Court of Appeal stated that the record did not disclose the state law equivalent of *Batson* error,[1] and affirmed Johnson's conviction. Johnson exhausted his remaining state remedies.

Johnson then filed a federal habeas petition alleging a *Batson* violation. A magistrate judge held an evidentiary

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[1] *People v. Wheeler*, 583 P.2d 748, 761-62 (Cal. 1978).

hearing and recommended that Johnson's petition be denied and the action dismissed. The district court adopted that recommendation and Johnson appealed.

A Ninth Circuit majority reversed and remanded with instructions to issue the writ. *Johnson v. Vasquez*, 3 F.3d 1327, 1328 (9th Cir. 1993). After identifying the correct standard of review, including the presumption of correctness which attaches to state factual determinations,[2] the Ninth Circuit first noted a "strong indication" of the prosecutor's racial motive based on his admitted change in attitude after he saw defense counsel striking "people from particular races." 3 F.3d at 1329-1330. The Ninth Circuit next scrutinized the record and concluded that each of the prosecutor's facially race-neutral reasons was "unsupported in the record or refuted by it." 3 F.3d at 1331. The Ninth Circuit held that Johnson's conviction was tainted by *Batson* error and ordered habeas relief. *Ibid.*

Petitioner seeks certiorari based on an alleged failure of the Ninth Circuit to defer to state factual findings.

REASONS FOR DENYING THE WRIT

The decision below is correct. There is no conflict among the circuits (indeed, none is alleged), nor is there any reason for granting review. The Ninth Circuit duly enforced this court's decision in *Batson* where there was a "strong indication" on the record of racial motive despite

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[2] 3 F.3d at 1329, citing *Sumner v. Mata*, 449 U.S. 539, 547 (1981).

four pretextual, albeit facially-neutral, reasons stated by the prosecutor. The Ninth Circuit complied with the statutory presumption of correctness under 28 U.S.C. § 2254(d), as that presumption is limited by a relevant statutory exception.

I.

THE DECISION OF THE NINTH CIRCUIT IS CONSISTENT WITH THE PRESUMPTION OF CORRECTNESS ACCORDED TO STATE FACTUAL FINDINGS, INCLUDING THE STATUTORY EXCEPTIONS TO THAT PRESUMPTION.

A. The Presumption Of Correctness Under 28 U.S.C. § 2254(d) Is Subject To Statutory Exceptions.

Petitioner maintains that the Ninth Circuit "violated the rules" regarding the presumption of correctness contained in 28 U.S.C. § 2254(d). The presumption of correctness is limited by relevant exceptions including cases – such as the case at bar – where state factual findings are "not fairly supported by the record." 28 U.S.C. § 2254(d)(8).[3]

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[3] 28 U.S.C. § 2254(d)(8) provides that state factual determinations generally shall be presumed to be correct:

> " . . . unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record . . . "

That exception authorizes the Ninth Circuit's holding in this case. The reason for exception (d)(8) is to empower federal courts to correct federal constitutional violations apparent on the state record.

In failing to mention any statutory exceptions to the presumption, petitioner inaccurately depicts the presumption under 28 U.S.C. § 2254(d) as virtually conclusive. The presumption does not divest federal courts of jurisdiction to determine whether state findings on federal constitutional issues are fairly supported by the record. The Ninth Circuit conducted proper scrutiny of the state record and concluded that *Batson* error had occurred in Johnson's trial.

B. The Ninth Circuit Correctly Determined That The Prosecutor Had A Racial Motive, That The Prosecutor's Stated Reasons Were Pretextual, And That State Factual Findings To The Contrary Were Not Fairly Supported By The Record.

The Ninth Circuit adhered to the sequence of analysis contained in this court's *Batson* decision. The first question of whether Johnson offered prima facie evidence of intentional discrimination was bypassed. 3 F.3d at 1329 n. 2. The second question of whether the prosecutor offered facially race-neutral reasons for the strike was assumed to be resolved in the prosecutor's favor. 3 F.3d at 1329.

The pivotal third question was whether Johnson carried his burden of demonstrating intentional racial discrimination. *Ibid.* The Ninth Circuit concluded, after finding a "strong indication" on the record of racial motive, that each of the prosecutor's stated reasons was

"either unsupported in the record or refuted by it." 3 F.3d at 1329-1331. The Ninth Circuit examined each stated reason in detail and found no fair support in the record for any of them. On the contrary, the Ninth Circuit found that each stated reason was "belied by the record." 3 F.3d at 1331. Given those findings, the Ninth Circuit properly noted that "neither the trial courts nor we are bound to accept at face value a list of neutral reasons that are either unsupported in the record or refuted by it." *Ibid.*

The Ninth Circuit complied with the statutory presumption of correctness as limited by 28 U.S.C. § 2254(d)(8).[4] The Ninth Circuit considered – and properly rejected – state factual determinations which lacked even fair support in the record. There was no "violation of the rules" but rather a conscientious adherence to them.

II.

THE DECISION OF THE NINTH CIRCUIT IS NECESSARY AND APPROPRIATE TO IMPLEMENT THIS COURT'S *BATSON* DECISION.

Despite petitioner's purple prose, the Ninth Circuit's decision is neither "cancerous" nor does it invite other courts to "scoff at the presumption of correctness." The presumption of correctness does not extend to state factual determinations lacking even fair support in the record. 28 U.S.C. § 2254(d)(8).

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[4] Cf. *Rushen v. Spain*, 464 U.S. 114, 120 (1983) (finding of fact by state trial and appellate courts deserves high measure of deference, but may be set aside if it lacks even fair support in the record).

As the Ninth Circuit observed, *Batson* would be a "dead letter" if the federal courts are powerless to reject state findings which are flatly contradicted, or totally unsupported, by the record. 3 F.3d at 1331.[5] The exception of 28 U.S.C. § 2254(d)(8) provides that power.

This case demonstrates why a federal forum is necessary to implement *Batson*. From time to time, state courts may be unable or unwilling to look behind a prosecutor's facially race-neutral explanations, even when those explanations are "unsupported by the record or refuted by it." The federal courts have habeas corpus jurisdiction precisely to secure federal constitutional rights, such as Johnson's, after the state courts have failed to do so.

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[5] This case presents a rare instance where the state prosecutor virtually admitted a racial motive, implying that he was responding to defense counsel "excluding people from particular races . . . " That implied admission by the prosecutor, in and of itself, would justify a finding that the prosecutor had a racial motive despite various neutral explanations. Given the further factor that the neutral explanations were "belied" by the record, there was ample and overwhelming support for the Ninth Circuit to reach its conclusion within the parameters of 28 U.S.C. § 2254(d)(8).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully subn..tted,

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